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No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE L. WEIDENFELLER
Acting General Counsel
CAROLE W. WILSON
Associate General Counsel
HOWARD M. SCHMELTZER
Assistant General Counsel
HAROLD J. RENNETT
Attorney
United States Department of Housing and Urban Development
Washington, D.C. 20410

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
BARBARA C. BIDDLE
HOWARD SCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

36 pp

QUESTION PRESENTED

Section 1437d(*l*)(6) of Title 42 of the United States Code (Supp. IV 1998) provides that public housing leases must contain a clause stating that "any drug-related criminal activity on or off [the] premises engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."

The question presented is:

Whether the lease clause provided for in 42 U.S.C. 1437d(*l*)(6) (Supp. IV 1998) is violated by such drug-related criminal activity, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug activity.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties in the court of appeals were Herman Walker, Willie Lee, Barbara Hill, Harold Davis, and the Oakland Housing Authority.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States Department of Housing and Urban Development, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of en banc court of appeals (Pet. App. 1a-67a) is reported at 237 F.3d 1113. The order of the court of appeals (Pet. App. 68a-69a) providing for rehearing en banc is reported at 222 F.3d 614. The opinion of the panel of the court of appeals (Pet. App. 70a-137a) is reported at 203 F.3d 627. The opinion of the district court (Pet. App. 138a-166a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. On April 11, 2001, Justice O'Connor extended the time for filing a petition for a writ of

certiorari to and including May 24, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Housing Act of 1937, 42 U.S.C. 1437d(*l*) (Supp. IV 1998), and regulations of the Department of Housing and Urban Development are set forth at Pet. App. 167a-172a.

STATEMENT

This case concerns the meaning of a clause that a federal statute requires each public housing authority (PHA) to include in leases of public housing units that receive federal housing assistance. The clause provides that drug-related criminal activity by specified individuals is a ground for eviction. The Oakland Housing Authority (OHA) instituted eviction proceedings against four tenants pursuant to that clause. The tenants instituted this action in the United States District Court for the Northern District of California to obtain an injunction against their eviction. The district court granted them a preliminary injunction, but a panel of the court of appeals reversed. On rehearing en banc, the court of appeals affirmed the district court's decision.

1. The United States Housing Act of 1937 (Housing Act), 42 U.S.C. 1437 *et seq.*, authorizes the Secretary of Housing and Urban Development (HUD) to make loans or loan commitments to public housing agencies to help finance the development, acquisition, or operation of low-income housing projects by such agencies. 42 U.S.C. 1437b(a).

In 1988 and 1990, Congress amended the Housing Act in an effort to keep drug-related activity out of

public housing. Congress made the following findings:

> (1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;
>
> (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial governmental expenditures;
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities.

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. 11901 (1994 & Supp. IV 1998)).[1] In light of those findings, Congress also mandated in 1988 that "[e]ach public housing

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[1] The words "or violent" were inserted after "drug-related" in paragraphs (2) and (4) by Pub. L. No. 105-276, §§ 586(b)(1) and (2)(A), 112 Stat. 2646. Additional findings were added by Section 586(b)(2)(B) of that Public Law.

agency shall utilize leases which" provide that

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

Anti-Drug Abuse Act of 1988, § 5101, 102 Stat. 4300. That provision was amended in 1990 to require that public housing leases

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4185 (codified at 42 U.S.C. 1437d(*l*)(5) (1994)). The provision was again amended in 1996 by changing the phrase "on or near such premises" to "on or off such premises." Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836. It is now codified at 42 U.S.C. 1437d(*l*)(6) (Supp. IV 1998).[2] See also 42 U.S.C. 1437d(*l*) (1994 & Supp. IV 1998) (defining "drug-related criminal activity" to mean "the illegal manufacture, sale, distribution, use, or possession with

[2] The provision was redesignated from paragraph (5) to paragraph (6) of Section 1437d(*l*) by Pub. L. No. 105-276, § 512(b)(1), 112 Stat. 2543.

intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in [21 U.S.C. 802]").

HUD's regulation establishing mandatory lease terms for public housing tenants, which was promulgated before the 1996 amendment that changed "on or near" to "on or off," closely tracks the statutory language. The regulation requires leases to impose an obligation on the tenant:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. 966.4(f)(12)(i).

In issuing its regulation, HUD explained that permitting the landlord to evict a tenant for breach of lease obligations is a "normal and ordinary incident of tenancy," and that permitting eviction based on the behavior of household members gives the tenant and other household members "a strong motive to avoid behavior which can lead to eviction." 56 Fed. Reg. 51,560, 51,566 (1991). In light of Congress's determination that drug crimes "are a special danger to the security * * * of public housing residents," *id.* at 51,566-51,567, HUD considered it appropriate that the

"tenant should not be excused from contractual responsibility by arguing that [the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit," *id.* at 51,567.

HUD's regulations do not require public housing authorities to evict the tenant in every instance of a violation of the lease provisions. Instead, the regulations provide that "[i]n deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. 966.4(*l*)(5)(i).

2. In late 1997 and early 1998, OHA instituted eviction proceedings in state court against the four public housing tenants who are plaintiffs in this case—Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker. In each case, OHA alleged that the tenant had violated paragraph 9(m) of his or her lease, a provision that implements Section 1437d(*l*)(6) and that obligates the tenant to "assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premises." Pet. App. 5a-6a.

Pearlie Rucker is a 63-year-old woman who has lived in public housing since 1985. OHA's complaint alleged that her daughter, who resides with her, was found with cocaine and a crack cocaine pipe three blocks from Rucker's apartment. OHA subsequently sought and obtained a dismissal of the complaint without prejudice in February 1998. Pet. App. 6a; *id.* at 141a.

Willie Lee is 71 years old and has lived in public housing for more than 25 years. OHA's complaint alleged that Lee's grandson, who resides with her, was caught smoking marijuana in the apartment complex parking lot. Pet. App. 6a; see also Gov't C.A. E.R. 7.

Barbara Hill is 63 years old and has lived in public housing for more than 30 years. OHA's complaint alleged that Hill's grandson, who resides with her, was caught with Lee's grandson in the apartment complex parking lot and admitted smoking marijuana. Pet. App. 6a; see also Gov't C.A. E.R. 8.

Herman Walker is a disabled 75-year-old man who has lived in public housing for ten years. He requires an in-home caregiver. OHA's complaint alleged that on three instances within a two-month period, Walker's caregiver and two others were found with cocaine in Walker's apartment. Each time, Walker was issued a lease violation notice. After OHA instituted the action to evict Walker, Walker fired his caregiver. Pet. App. 6a.

3. Following the institution of eviction proceedings against them in state court, the four tenants commenced this action in the United States District Court for the Northern District of California. They sought, *inter alia*, a preliminary and permanent injunction that would prohibit OHA from evicting any tenants without proof "that a tenant personally participated in, had prior knowledge of, and the actual ability to prevent criminal activity on the premises." Gov't C.A. E.R. 14.

The district court determined that neither Section 1437d(*l*)(6) itself nor its legislative history "addressed the question of whether a housing authority may terminate the lease of an 'innocent' tenant," Pet. App. 147a, see also *id.* at 148a, which the court defined as a tenant who is "innocent of the drug-related criminal activity which is the cause of the lease termination and * * * also innocent of any knowledge of the drug-

related criminal activity," *id.* at 141a. The court then considered whether HUD's interpretation of the statute to authorize eviction in such circumstances rests on a permissible construction of the statute, to which the courts must defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 151a. The court adverted in that regard to 42 U.S.C. 1437d(*l*)(1), which prohibits public housing authorities from using leases that "contain 'unreasonable terms and conditions.'" Pet. App. 151a (quoting 42 U.S.C. 1437d(*l*)(1)). The court concluded that the tenants had "shown, at a minimum, the existence of serious questions and a fair chance of success with respect * * * to whether OHA's termination of a tenant's lease for a household member's drug-related criminal activity outside of the tenant's unit is unreasonable within the meaning of 42 U.S.C. § 1437d(*l*)(1) when the tenant had no knowledge of, and no reason to know of, the activity." *Id.* at 160a. The court further expressed the view that eviction in those circumstances would be "irrational" and for that reason unconstitutional. *Id.* at 160a-162a.

The court also addressed claims by Rucker and Walker that evicting them would violate the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (ADA). The court held that "[p]laintiffs may not state a claim under the ADA against HUD as the ADA does not apply to actions taken by the federal government." Pet. App. 153a. The court, however, permitted Walker's ADA claim—but not Rucker's[3]—to proceed against the Oakland defendants. *Id.* at 156a-157a. The tenants did not appeal the district court's ruling that

[3] The district court rejected Rucker's ADA claim on the ground that she does not allege that she is disabled. Pet. App. 155a.

HUD was not subject to an ADA claim. As a result, no ADA claim is before the Court on this certiorari petition filed by HUD.

The court issued a preliminary injunction prohibiting OHA "from terminating the leases of tenants * * * for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, and had no reason to know of, the drug-related criminal activity." Pet. App. 165a-166a. The injunction was not limited merely to the four tenants who had brought the case, but broadly applied to all "leases of tenants." *Id.* at 165a. The court also enjoined OHA from prosecuting any of the three eviction actions that remained pending in state court after the *Rucker* action was dismissed. *Id.* at 166a. The court noted, however, that OHA "is not preliminarily enjoined from evicting tenants * * * for drug-related criminal activity in the tenant's apartment, regardless of whether the tenant knew, or had reason to know, of the criminal activity," except for Walker, the validity of whose eviction, the court concluded, would turn on the ADA. *Ibid.*; see also *id.* at 163a.

4. A divided panel of the Ninth Circuit reversed the district court's decision and vacated the preliminary injunction. Pet. App. 68a-137a. The majority "concluded that the plain language of 42 U.S.C. § 1437d(*l*)(5), considered both by itself and in light of the broader statutory context, makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity." *Id.* at 107a. Judge William Fletcher dissented. *Id.* at 115a-137a.

5. a. The court of appeals ordered rehearing en banc. Pet. App. 69a. By a 7-4 vote, the en banc court affirmed the district court's entry of a preliminary injunction.

Id. at 1a-67a. The court noted that the issue before it was whether "the district court * * * based its decision on an erroneous legal interpretation" of Section 1437d(*l*)(6), "thereby abusing its discretion." *Id.* at 10a. The court stated therefore that it would address "the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo." *Ibid.* The court held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." *Id.* at 26a. Rejecting HUD's interpretation of the statute, under which the tenant is not "excused from contractual responsibility by arguing that [the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit," 56 Fed. Reg. at 51,567, the court concluded that "Congress had an intention on the precise question at issue that is contrary to HUD's construction," and that therefore "HUD's interpretation is not entitled to deference" under *Chevron*. Pet. App. 11a.

The court first examined the text of Section 1437d(*l*)(6). The court concluded that the statutory language "does not compel either party's interpretation" because it "does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted." Pet. App. 12a. The court was of the view, however, that construing the statute to permit eviction of tenants who are not shown to have known of the drug-related activity would be "irrational" and "thus would require PHAs to include an unreasonable term in their leases," in violation of Section 1437d(*l*)(1). *Id.* at 15a. In particular, the court stated, permitting such evictions "could not have a

deterrent effect because the tenant would have already done all that tenant could do to prevent the third-party drug activity." *Id.* at 14a.

The court also believed that a separate statutory provision supported its interpretation. The court noted that in 1988, when Congress first enacted what is now Section 1437d(*l*)(6), Congress also amended a pre-existing civil forfeiture provision in 21 U.S.C. 881(a)(7) (1982 ed. Supp. V 1987) specifically to include leasehold interests among the property that was subject to forfeiture because it was used to commit or facilitate a drug-related offense. See Anti-Drug Abuse Act of 1988, § 5105, 102 Stat. 4301. At the time of the amendment, that provision already contained an "innocent owner" defense that precluded forfeiture "by reason of any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. 881(a)(7) (1982 ed. Supp. V 1987).[4] The court "presume[d] Congress meant [the forfeiture provision and Section 1437d(*l*)(6)] to be read consistently." Pet. App. 17a.

The court also relied on the legislative history of the 1990 amendment to Section 1437d(*l*)(6). The committee report on the Senate version of the bill stated:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests

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[4] This provision has now been replaced by a general "innocent owner" defense to civil forfeiture. See Pub. L. No. 106-185, § 2(a), 114 Stat. 202, to be codified at 18 U.S.C. 983(d). See Pet. App. 16a n.1.

or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990). The report also stated, in describing a parallel provision in the same bill concerning the Section 8 housing program, that "the Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t." *Id.* at 127. Rejecting HUD's argument that the report simply "indicates Congress's intent to confer wide discretion on HUD and the local PHAs," Pet. App. 20a, the court held that the "reports are very clear that such evictions *would not* be appropriate, and that in such circumstances good cause to evict *would not* exist." *Id.* at 21a. Accordingly, the court "reject[ed] HUD's interpretation as contrary to the clearly expressed intent of Congress." *Ibid.*

The court added that HUD's interpretation of the statute should be rejected because it would, in the court's view, lead to "absurd results." Pet. App. 21a. The court stated that "there was nothing more Pearlie Rucker could have done to protect herself from eviction"; that "the statute would * * * permit eviction * * * if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana"; and that "the provision would * * * authorize eviction if a household member had been convicted of a drug crime years earlier." *Id.* at 22a.

Finally, the court concluded that the principle of constitutional avoidance supported its result, because "[p]enalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause." Pet. App. 24a. The court distinguished *Bennis* v. *Michigan*, 516 U.S. 442 (1996), which permitted forfeiture of a wife's interest in a car because of her husband's use of the car to engage in sexual activities with a prostitute, conduct of which the wife was unaware. The court's primary distinction of *Bennis* was that the property in *Bennis* had been "used in criminal activity," while the leasehold interests here (with the exception of Walker's apartment) had not been. Pet. App. 25a.

The court affirmed the district court's grant of a preliminary injunction. In addition, without discussing any issues concerning the allocation of the burden-of-proof, the court stated that "OHA remains free to proceed with evictions for off-premises drug activities when *it can prove* the tenant knew or should have known of the activity." Pet. App. 28a (emphasis added); see also *id.* at 29a & n.10.

b. Judge Sneed, joined by three other judges, dissented. Pet. App. 32a-67a. In his view, "[b]ecause the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute." *Id.* at 33a. But he noted as well that "whether one accepts our contention that the statutory language is clear or the majority's argument that the language is silent, application of the *Chevron* test to the present controversy leads to the same conclusion." *Id.* at 33a-34a.

Judge Sneed noted that the text of Section 1437d(*l*)(6) authorizes eviction when "a 'public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control' engages in 'any drug related criminal activity.'" Pet. App. 35a. He explained that "[t]he majority's reading of the statute requires that the drug user fall into two of the categories—a drug user must be both a household member/guest *and* under the tenant's control"—a read-

ing that "renders the enumerated categories (tenants, household members, guests) superfluous." *Id.* at 37a.

Judge Sneed also believed that other statutory provisions supported HUD's construction of the statute. In his view, for example, the fact that Congress included express "innocent owner" language in the forfeiture statute merely underscores the significance of Congress's omission of any similar language in Section 1437d(*l*)(6). Pet. App. 42a-44a. See also *id.* at 40a-42a (discussing 42 U.S.C. 1437d(c)(4)(A) (1994)).

Judge Sneed disputed the majority's contention that Section 1437d(*l*)(1) would impose an "unreasonable" lease term if it permitted eviction of tenants who were ignorant of the drug-related conduct. He explained that "[t]he ignorant tenant eviction provision rationally addresses" Congress's concerns about the serious problems caused by drug crimes in public housing projects, because it gives the public housing authority "a credible deterrent against criminal activity" and because "requir[ing] proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical" in any case in which the tenant was not himself found in the presence of the offender during the drug-related criminal activity. Pet. App. 51a. He also noted that the provision empowers other tenants to report drug-related activity, and thereby help clean up their own projects, "without fearing the possibility of retaliation" from drug dealers. *Id.* at 53a. He added that "a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants" and that fact "attests to [its] reasonableness." *Id.* at 54a.

Finally, Judge Sneed concluded that Section 1437d(*l*)(6), without an "ignorant owner" exception, is constitutional. He explained that "[t]he failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny," especially in light of the fact that "Congress must draw distinctions 'in order to make allocations from a finite pool of resources.'" Pet. App. 60a (quoting *Lyng* v. *International Union, United Auto Workers of Am.*, 485 U.S. 360, 373 (1988)). In Section 1437d(*l*)(6), he continued, "Congress has limited the right to reside in public housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests." *Id.* at 58a. The provision thus "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." *Id.* at 61a. And "[b]ecause the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction." *Ibid.* For those reasons, Judge Sneed concluded, the statute is constitutional.

REASONS FOR GRANTING THE PETITION

As the court of appeals itself recognized, "[m]any of our nation's poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children." Pet. App. 2a. In an effort to end what Congress termed the "reign of terror" imposed by drug dealers on public housing tenants, 42 U.S.C. 11901 (1994 & Supp. IV 1998), Congress enacted Section 1437d(*l*)(6) in 1988 and strengthened it in 1990 and 1996. The decision of the court of appeals drains much of the

meaning and significance from that statute and the implementing regulation issued by HUD. The result is to deprive public housing authorities of an important tool to achieve safe and liveable public housing, and to deprive public housing tenants of protection that Congress found to be of central importance for their security and well-being.

Most cases construing Section 1437d(*l*)(6) arise in state, not federal, court, because issues concerning its application typically arise in eviction cases brought in state court. There is division in the state courts as to whether Section 1437d(*l*)(6) authorizes eviction regardless of the tenant's knowledge of criminal conduct by persons specified in the statute, although most state courts have agreed with HUD's position that the statute does not contain an exception for situations involving lack of knowledge. Moreover, the Ninth Circuit's decision conflicts with the interpretation of the statute by the Supreme Court of Tennessee, which determined that "both the language of [the applicable] lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity." *Memphis Hous. Auth.* v. *Thompson*, 38 S.W.3d 504, 512 (2001). The Ninth Circuit's decision also conflicts with the decision of the Minnesota Supreme Court in *Minneapolis Public Housing Authority* v. *Lor*, 591 N.W.2d 700 (1999), which held that Section 1437d(*l*)(6) and the implementing HUD regulation authorize a public housing authority to terminate a lease based on the criminal conduct of a household member even when the tenant does not have knowledge of the conduct.

In addition, the Ninth Circuit's decision is at odds with core principles of administrative law recognized by

this Court, since the court of appeals' decision rested on its own conclusions about the best interpretation of Section 1437d(*l*)(6), rather than deference to HUD's considered view that that provision does not admit of an "ignorant owner" or "innocent owner" exception. And because the en banc court's decision rests on its *de novo* construction of the statute, it will not be open to modification in any further proceedings on remand. The court's decision therefore will govern all public housing authorities in a large geographic area of the country. Accordingly, review by this Court of the important and recurring issue presented is warranted.

1. The Ninth Circuit held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." Pet. App. 26a. Indeed, the court's decision could be read to have concluded that the burden of proof with respect to whether a tenant had "a lack of knowledge or other reason" for failure to control the drug-related activity rests with the public housing authority. See *id.* at 28a ("OHA remains free to proceed with evictions for off-premises drug activities when it can prove the tenant knew or should have known of the activity."); *id.* at 29a & n.10; compare *id.* at 51a-54a (Sneed, J., dissenting).[5]

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[5] The court of appeals noted that the district court did not enjoin OHA from pursuing evictions of tenants "when the drug-related activity occurs within the tenant's apartment, creating a rebuttable presumption that [the] tenant controls what occurs in his or her unit." Pet. App. 28a-29a. In fact, the reference in the district court's opinion to a "rebuttable" presumption in those circumstances was to what the plaintiff tenants argued, not what the district court's decision held. See *id.* at 162a. Of course,

Thus, eviction would depend on difficult questions of proof as to whether the tenant knew of the drug-related activity and, perhaps, whether the tenant had the ability to control it.[6]

The Ninth Circuit's interpretation of Section 1437d(*l*)(6) essentially neutralizes an important tool that Congress designed to assist in ridding public housing of the scourge of drug-related criminal activity. Aside from the rare case in which the tenant is caught in the immediate presence of a household member or guest using or trafficking in drugs, the showing required by the Ninth Circuit (especially if, as the Ninth Circuit appeared to suggest, the burden of proof is on the housing authority) will be an insuperable obstacle to eviction. In most cases, a tenant threatened with eviction is likely to deny any knowledge of or ability to control drug-related criminal activity. Moreover, the household member or guest engaged in the drug-related activity is likely (if he does not invoke his Fifth Amendment privilege) to confirm the tenant's denials.

The housing authority typically will have little ability to contest the tenant's denial of knowledge or control. Proving the knowledge of those who directly partici-

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imposition of such a rebuttable of presumption of control, even when drug-related criminal activity occurs in the unit itself, would undermine the important purposes underlying Section 1437d(*l*)(6).

[6] The court's test appears to rest ultimately on whether the tenant could control the household member or guest. See Pet. App. 26a. But in another portion of its opinion, the court stated that "[t]he district court's injunction does not address the issue of whether tenants who have knowledge of off-premises drug activities by household members may be evicted if they attempt in good faith to prevent their household members from engaging in such activity, but are unable to do so. Accordingly, we do not consider that question here." *Id.* at 28a n.9.

pate in criminal activity is difficult even for prosecutors who are armed with standard prosecutorial tools: the grand jury's subpoena power, the ability to induce co-conspirators to cooperate, and even the ability to conduct wiretaps and use other similar investigative techniques when appropriate. Under the Ninth Circuit's standard, however, public housing authorities, who have none of those tools available, apparently must prove the knowledge of tenants who are not necessarily direct participants in the criminal activity at all. Section 1437d(*l*)(6) was formulated to deal with that problem by enabling housing authorities to maintain the security of public housing projects by removing tenants who allow drug criminals into their units. The Ninth Circuit's decision substantially undermines the ability of public housing authorities to use Section 1437d(*l*)(6) to achieve that goal, and to do so as swiftly as possible.

Of course, the fact that the clause permits PHAs to evict tenants who violate it does not mean that it *requires* PHAs to do so in all circumstances. To the contrary, HUD regulations provide that "[i]n deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. 966.4(*l*)(5)(i). In this very case, OHA voluntarily ceased its effort to evict tenant Rucker, presumably based on a consideration of the factors enumerated by HUD. As Judge Sneed recognized, leaving discretion with the public housing authority makes sense, both because it gives tenants an incentive "to accept remedial actions short of eviction," Pet. App. 61a, and because the local

public housing authority is in the best position to assess the seriousness of a drug problem at a given project and the contribution to that problem made by a particular tenant, other household members, and other persons connected with the unit. Under the Ninth Circuit's decision, however, that discretion is largely nullified.

2. The Ninth Circuit's construction of Section 1437d(*l*)(6) conflicts with the interpretation of the same statute by the Tennessee Supreme Court in *Memphis Housing Authority* v. *Thompson*, *supra*. In that case, the court reviewed the conflicting decisions from lower courts addressing the meaning of Section 1437d(*l*)(6), including the Ninth Circuit's en banc decision in this case. See 38 S.W.3d at 509-511. The court noted that the statute, and the lease provisions that were derived from the statute, "refer to four separate categories of people: (1) the resident * * *; (2) household members; and (3) guests or (4) other persons under the resident's control." *Id.* at 511-512. It then concluded that "both the language of this lease, and the federal statute from which it is derived, *clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity*." *Id.* at 512 (emphasis added). By contrast, the Court concluded that "the language is not clear with respect to the standard that applies to a guest or other person under the resident's control." *Ibid.* In those situations, the court held that the statute and lease provision "permit[] eviction only if [the housing authority] establishes that [the tenant] knew or should have known of the drug-related criminal activity 'of a guest or other person' and failed to take reasonable steps to prevent or halt it." *Id.* at 513.

The Supreme Court of Tennessee thus explicitly disagreed with the Ninth Circuit that knowledge must be shown in cases in which the eviction is based on conduct

of household members—as it was in the case of the three tenants (Rucker, Lee, and Hill) whose claims are the focus of this petition.[7] Although the Supreme Court of Tennessee in *Thompson* agreed with the Ninth Circuit's approach when Section 1437d(*l*)(6) is applied to drug-related activity by guests or other persons under the tenant's control—*i.e.*, *non*-household members—none of the three tenants whose claims are at issue here was threatened with eviction based on conduct of a non-household-member.[8] Accordingly, there is an explicit disagreement between the Ninth Circuit and the Supreme Court of Tennessee with respect to each of the claims at issue in this petition.

It is true that *Thompson* itself arose from an attempted eviction based on the conduct of a guest of a tenant—unlike this case, which arose from attempted evictions based on the drug-related conduct of house-

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[7] Three instances of drug-related criminal activity occurred in Walker's apartment. Therefore, in the absence of Walker's ADA claim, even the Ninth Circuit would have held that knowledge could be presumed and he could be evicted under Section 1437d(*l*)(6). See Pet. App. 29a. Based on the district court's unappealed ruling that HUD may not be sued under the ADA, however, HUD is no longer a defendant with respect to Walker's ADA claim. See p. 8, *supra*. Accordingly, we do not challenge in this petition the court of appeals' ruling or the district court's injunction against OHA insofar as it concerns Walker's ADA claim.

[8] In our view, the court in *Thompson* erred in holding that the tenant's knowledge or control must be shown where the eviction is based on drug-related criminal activity by a "guest or other person." The statutory term "control" simply "means that the tenant 'controls' who has access to the premises" and it "in no way implies that the tenant knew or should have known of the drug activity." *Housing Auth.* v. *Green*, 657 So. 2d 552, 554 (La. Ct. App.), writ denied, 661 So. 2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996).

hold members. But the Supreme Court of Tennessee was unequivocal in its interpretation of Section 1437d(*l*)(6), stating that "we hold that the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member." 38 S.W.3d at 505. Regardless of whether the court's statement thus amounts to a square holding in light of the particular facts of *Thompson*, it is at least true that the Supreme Court of Tennessee has definitively spoken to the question of the meaning of Section 1437d(*l*)(6), and that ruling would have resulted in a decision reversing the district court in this case.[9]

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[9] Most other courts that have addressed the issue likewise have held that eviction does not depend on the tenant's knowledge of the criminal activity, without distinguishing (as the Tennessee Supreme Court did) between members of the household and guests or other persons under the tenant's control. The cases typically have involved drug-related activities in the tenant's apartment. See, *e.g.*, *City of South San Francisco Hous. Auth.* v. *Guillory*, 49 Cal. Rptr. 2d 367, 371-372 (App. Dep't Super. Ct. 1995) (eviction permissible without showing of tenant's knowledge); *Housing Auth.* v. *Green*, 657 So. 2d at 554 ("[W]hen the Congress * * * enacted this law it did so without the imposition of a knowledge requirement."); *Ann Arbor Hous. Comm'n* v. *Wells*, 618 N.W.2d 43, 45 (Mich. Ct. App. 2000) ("[W]e hold that a public housing tenancy may be terminated under [Section 1437d(*l*)(6)] regardless of whether the tenant had knowledge of the drug-related activity conducted on or off the premises by the tenant, a member of the tenant's household, or a guest or another person under the tenant's control."); *Willock* v. *Schenectady Mun. Hous. Auth.*, 706 N.Y.S.2d 503, 505 (App. Div. 2000) (permitting eviction "regardless of knowledge or fault on the part of the tenant"); *Syracuse Hous. Auth.* v. *Boule*, 701 N.Y.S.2d 541, 541 (App. Div. 1999) ("We reject the contention of respondent that, because she was not aware of the drug-related criminal activity and did not consent to it, good cause did not exist for her eviction."). But see *Delaware County Hous. Auth.* v. *Bishop*, 749 A.2d 997 (Pa. Commw. Ct.) ("[W]e refuse to hold a tenant strictly liable for unforeseeable criminal acts committed, without the tenant's knowledge, by family members who are not under the tenant's control."), app. denied, 764 A.2d 1073 (Pa. 2000), cert. denied, No. 00-1272 (Apr. 16, 2001).

In cases involving non-drug violent conduct, the courts have divided. Compare *Charlotte Hous. Auth.* v. *Patterson*, 464 S.E.2d 68, 71 (N.C. Ct. App. 1995) (must be showing of tenant's fault in case involving violence by household member), with *Chavez* v. *Housing Auth.*, 973 F.2d 1245, 1248 (5th Cir. 1992) (stating in case involving violence by household member or guest that "[t]he lease makes the tenant subject to eviction if any household member or guest conducts himself or herself in a manner inconsistent with the lease"); *Minneapolis Pub. Hous. Auth.* v. *Lor*, *supra* (no need for showing of fault in case involving violence by household member).

Moreover, in *Minneapolis Public Housing Authority* v. *Lor*, *supra*, the Supreme Court of Minnesota has squarely held, in a case that *did* involve an eviction based on the criminal conduct of a [redacted]-household member, that Section 1437d(*l*)(6) and the implementing HUD regulation authorized the termination of a lease and eviction of the tenant by a court, even though the trial court in that case found that the tenant had no knowledge of the criminal conduct of the household member and no reason to anticipate that conduct. These considerations, the court held, were instead factors the housing authority could take into account in deciding, in the exercise of its discretion, whether to terminate the lease and seek eviction. See 591 N.W.2d at 702, 703-704.

Although *Lor* involved a violent shooting by a household member, not drug-related activity, the question whether a tenant's lease may be terminated under Section 1437d(*l*)(6) for criminal conduct by a household member of which the tenant had no knowledge is the same under that Section for both types of criminal conduct. The Ninth Circuit's decision in this case thus

conflicts with that of the Minnesota Supreme Court in *Lor* as well.

3. The court of appeals misread the applicable statute and disrespected settled principles of administrative law in refusing to defer to HUD's interpretation.

a. The court of appeals erred in finding that the statutory text is ambiguous. Section 1437d(*l*)(6) requires a particular clause to be included in public housing leases. The clause does not condition a lease violation on the tenant's knowledge of the drug activity. Nor does it condition a lease violation on the tenant's "control" over the offender's criminal conduct, especially where, as here, the activity was undertaken by a "tenant" or a "member of the tenant's household." See note 8, *supra*. Instead, drug-related criminal activity by "any" individual within those categories is sufficient to warrant eviction. As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). To paraphrase *Gonzales*, because "Congress did not add any language limiting the breadth of that word," it must be read as "referring to all [tenants, members of the tenant's household, or guests]." *Ibid.*

b. Even if Section 1437d(*l*)(6) were ambiguous, however, HUD's regulation construing that statute not to require proof of knowledge or control by the tenant would be dispositive. The court gave four bases for its contrary conclusion. None of them supports the court of appeals' conclusion. But even if they did, they would at most show that the court's de novo interpretation of the statute is inconsistent with HUD's conclusion. Taken separately or together, they do not show that HUD's interpretation is impermissible under *Chevron*.

i. The court of appeals relied in large part on the "innocent owner" defense that Congress provided in 21 U.S.C. 881(a)(7) (1994) to civil forfeiture of any property (not merely a leasehold interest) that is used "to facilitate the commission of" drug related offenses. Pet. App. 15a-18a. That defense precludes forfeiture on the basis of "any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of th[e] owner." *Id.* at 43a n.6. Congress's determination to include an express innocent owner defense to civil forfeiture underscores the significance of Congress's failure to include any such defense or exception in the lease clause mandated by Section 1437d(*l*)(6). The civil forfeiture provision thus supports HUD's construction of the statute. See *id.* at 42a-44a (Sneed, J., dissenting). But even if we were incorrect in contending that the civil forfeiture provision affirmatively supports HUD's interpretation, the inclusion of that express defense in the civil forfeiture statute enacted four years before Section 1437d(*l*)(6) could not possibly establish that HUD's interpretation of the very different language of Section 1437d(*l*)(6)—which contains no similar clause and applies to consensual lease transactions rather than forfeitures that have nothing to do with consent—is impermissible.

ii. The court of appeals also relied on the proposition that applying the statute as written would lead to "absurd results," such as the eviction of tenants who in fact could not keep their household member from committing drug offenses, whose household member committed drug offenses at a place far removed from the public housing project, or whose household member committed a drug offense years ago. Pet. App. 21a-22a. The examples posited by the court of appeals, however, would not be "absurd" in all cases, and PHAs do not

ordinarily choose to evict tenants unless harsh results are in the end justified by the other benefits of the statute in its general operation.

There is no reason to believe that public housing authorities have exercised (or would exercise) their discretion to evict tenants in extreme cases; the only concrete example given by the court of appeals (that of tenant Rucker, see Pet. App. 22a) is one in which OHA dropped its effort to evict the tenant. Moreover, it is not at all unreasonable to believe that persons who commit drug offenses far from home will also commit (or have committed) similar offenses close to home as well. And the prospect of evicting a tenant because of a long-past drug offense of a household member or guest is not likely to be realistic; the statute as construed by HUD permits eviction only for drug-related criminal activity that occurs *while* the individual is a household member or guest. See 56 Fed. Reg. at 51,562 ("The question under the HUD rule is whether the person in question was in the premises with consent of a household member at the time of the criminal activity in question, not whether the person was a guest at some time in the past.").

In any event, whatever might be the appropriate course for a PHA to follow in the myriad factual scenarios that may arise, there can be no question that the broad sweep of Section 1437d(*l*)(6), as authoritatively construed by HUD, "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." Pet. App. 61a (Sneed, J., dissenting). It therefore offers hope to help resolve what Congress identified as a crisis situation in public housing, the foremost impact of which is on the truly innocent tenants in other units of the same

project whose households in no way contribute to the problem. The fact that the result might seem harsh in some instances in no way suggests that the scheme as a whole would lead to such "absurd results" that HUD's construction of the statute in accordance with its terms is impermissible. Cf. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574-576 (1982).

iii. The court's reliance on the legislative history of the 1990 version of Section 1437d(*l*)(6) also furnishes no justification for rejecting HUD's construction. The Senate Report on which the court relied (see Pet. App. 20a-21a) stated that cases arising under Section 1437d(*l*)(6) lease provisions "will require the wise exercise of humane judgment by the PHA and the eviction court" and that "eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." S. Rep. No. 316, *supra*, at 179; see also *id.* at 127 ("[T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t.").

The court of appeals failed to recognize that the committee report was discussing a Senate bill quite different from the one that was enacted, and one that imposed a considerably greater burden on the PHA in terms of what would constitute cause for eviction for drug-related crimes than Section 1436d(*l*)(6) as finally enacted. See 136 Cong. Rec. 15,991, 16,012 (1990) (reproducing S. 566, 101st Cong., 2d Sess. §§ 521(f) and 714(a) (1990), as they passed the Senate). The Conference Report declined to accept that language from the Senate bill and instead adopted the unqualified language of Section 1436d(*l*)(6). See H.R. Conf. Rep. No.

943, 101st Cong., 2d Sess. 418 (1990). Moreover, even the passages on which the court of appeals relied establish no more than an intent to endow PHAs with discretion and suggest how that discretion should be exercised. Those passages do not establish that Congress intended to withhold all discretion from PHAs to proceed with eviction in cases where they cannot prove knowledge or control by the tenant. And those passages in a report describing provisions that were not enacted into law certainly do not establish that Section 1437d(*l*)(6) as enacted forecloses HUD's interpretation.

iv. Finally, the court of appeals relied on the doctrine of constitutional avoidance to reject HUD's construction of Section 1437d(*l*)(6). The court based its conclusion on the proposition that "[p]enalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause," and that "HUD's interpretation would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing." Pet. App. 24a. Those principles, however, have no application here. Section 1437d(*l*)(6) does not impose a penalty. Instead, it enforces what is essentially a warranty by a tenant that his household will not be the source of a potential hazard (the commission of drug-related criminal offenses or the harboring of people who commit such offenses) to other tenants. The tenant is free to find other housing and thus not to make that warranty. This Court held in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), that a State constitutionally may forfeit an individual's interest in her own property to the State with no showing that she has engaged in any wrongdoing, intentional or otherwise. It follows *a fortiori* that a tenant may be evicted for her failure to comply

with a consensual provision to which she agreed in her lease, even if that failure was not otherwise her fault. That result follows from the straightforward application of settled principles of contract interpretation and enforcement.

4. Although the appeal in this case was taken from the issuance of a preliminary injunction, the procedural posture of the case poses no obstacle to this Court's review. The Ninth Circuit itself noted that, although it reviews a preliminary injunction for abuse of discretion, "[t]he district court * * * necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." Pet. App. 8a. Given the contentions of the parties in this case, the court stated that the issue before it was "the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo." *Id.* at 10a. The court went on to state its conclusions regarding the meaning of Section 1437d(*l*)(6) in entirely unequivocal terms. See, *e.g.*, *ibid.* ("Congress has spoken on the issue and * * * HUD's interpretation is contrary to congressional intent."); *id.* at 14a ("It is * * * our task to determine the meaning of subsection (6)."); *id.* at 21a ("Accordingly, we reject HUD's interpretation as contrary to the clearly expressed intent of Congress."); *id.* at 31a ("We find that Congress did not intend § 1437d(*l*)(6) to permit the eviction of innocent tenants."). The court of appeals also made quite clear that its holding turned on the provisions of Section 1437d(*l*)(6), not the particular lease terms at issue in this case. See *id.* at 28a ("Th[e] lease provision was required by the very HUD regulations we have invalidated, and is simply the embodiment of the erroneously broad interpretation of § 1437d(*l*)(6)."). Thus, the Ninth Circuit, sitting en banc, has definitively

interpreted Section 1437d(*l*)(6). That determination is not open to modification or reconsideration on remand in this case or in any other case. The legal issues are squarely presented at this time. For the reasons given above, review of the court of appeals' decision by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

BARBARA C. BIDDLE
HOWARD SCHER
Attorney

GEORGE L. WEIDENFELLER
Acting General Counsel

CAROLE W. WILSON
Associate General Counsel

HOWARD M. SCHMELTZER
Assistant General Counsel

HAROLD J. RENNETT
Attorney
United States Department of Housing and Urban Development

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